VINCENT C. GRAY
MAYOR

VIA HAND DELIVERY

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

Thank you for the opportunity to comment on Bill 19-993, the Local Budget Autonomy Act of 2012.

If enacted, the proposed bill would call for the Charter-amending procedure of the District of Columbia Home Rule Act (HRA) to provide for local budget autonomy without any affirmative congressional action. It would do so in two ways.

First, it would authorize a separate path for the appropriation of the District's local budget -- *i.e.*, revenues raised from District taxes, fees, and fines and those received under federal grant programs applicable nationally -- from the path for the federal portion -- *i.e.*, the federal payment to the District. The federal portion would continue to follow the path currently set forth in the District's Charter -- passed by Congress through its well-established authority to regulate District affairs under Article I of the U.S. Constitution -- that requires an affirmative appropriation by Congress and Presidential approval before any of it can be lawfully spent by the District Government. However, for the local portion, the rules would change. Rather than requiring an active, congressional appropriation and Presidential signature, the local portion would take effect after being passed by District lawmakers and then laying before Congress for *passive* review during the 30 legislative day period unless Congress passes, and the President approves, a Joint Resolution disapproving the act of the Council.

Second, it would provide for a change in the dates of the fiscal year for the District of Columbia Government -- from its current schedule, October 1-September 30, which currently

tracks the schedule of the federal budget, to run from July 1 through June 30 on its own independent track.

As you know, I fully and passionately support the goal of securing budget autonomy for the District of Columbia as soon as possible. I know that the Council generally shares this view, and I applaud the Councilmembers for focusing on this critical issue. Indeed, I have been diligently working with federal leaders to achieve this goal through congressional legislation.

At the same time, I take very seriously my obligation to help ensure that the District Government complies with the governing law. After close study by the OAG and senior lawyers in my administration, I am doubtful that Congress has delegated the power to the District to convert unilaterally the role played by Congress and the President in the District's budget from active participation to passive review. I am concerned about whether the bill if enacted would violate a number of provisions in the HRA and in Title 31 of the U.S. Code, which governs the process and rules for the budget enacted by Congress and carries civil and criminal penalties for violations.

My administration is not alone in raising these legal concerns. Independent experts with decades of experience in District of Columbia jurisprudence have expressed this view. On October 26, 2012 Wayne Witkowski, a former OAG deputy attorney general for the Legal Counsel Division in OAG and Leonard Becker, a former general counsel to Mayor Anthony A. Williams and former D.C. Bar counsel, wrote an Op-Ed piece in the Washington Post on Bill 19-993 titled "*An Unlawful Proposal for D.C. Budget Autonomy*," which I have attached to this letter. The two conclude unequivocally after their legal analysis: "[T]he Home Rule Act does not permit a referendum on budget autonomy. The only way the charter can be amended as proposed is through an act of Congress." As the op-ed notes, this is a long-held understanding within the District government: "for almost four decades, the District's elected leadership, officials and lawyers have not viewed Section 303 as a vehicle for changing the District's budget procedures."

The legal problems that they and our lawyers raise are significant and are exacerbated by the risks, delays, and uncertainties that could be associated with likely future litigation over the validity of the District's local budget expenditures. Budgets require predictability and stability and the proposed plan threatens to send us in the opposite direction.

Further, I am also concerned about whether the bill has been carefully enough vetted so as to avoid undermining the District's crucially important relationship with Congress and our federal partners, damage to which could affect us adversely across a range of key issues for the resources and effectiveness of our local government.

Below I discuss in more detail my deep, abiding support for District budget autonomy, and also summarize the significant legal and practical concerns about seeking to achieve that goal through the approach embodied in this bill. I provide a summary of these concerns for the

Council's consideration before it takes steps that in the long-run may not be in the District's best interests.

The District's Need for Budget Autonomy

The District of Columbia's lack of budget autonomy creates major and disruptive uncertainty in the functioning of this government. Over the past 15 years, Congress has in virtually every one of those years failed to pass the appropriations bill that covers the District budget by the start of the fiscal year. Despite the District submitting a balanced budget each and every year during that period, Congress has forced the District to operate in a fluctuating fiscal year. Every year, the District provides our budget, balanced and on time. Every year, we are forced to wait days, weeks and months for Congress to get around to us.

This is unacceptable and should end.

The District of Columbia, unlike the federal government, cannot simply print more money or increase its debt level to provide breathing room. Not having budget autonomy imposes significant costs upon us. As things currently stand, the District is at risk of shutting down *every time* the federal government faces a shutdown. Each time this occurs, the District, as a result of our lack of budget autonomy, is held hostage to Congress' inability to pass the budget timely and is forced to spend precious time and significant resources planning for a shutdown contingency. In addition, the routine months-long delays in Congress to approve our local budget cost the District millions in interest charges, and they undermine sound fiscal planning. Throughout the year, the District adjusts its budget to ensure that a balance between what we take in and what we spent is maintained.

Not only does the lack of budget autonomy exact an unnecessary and unfortunate cost on the District, it is also clear that the District's performance affirmatively justifies budget autonomy. The District Government collects well over $5 billion annually in local government taxes and fees. Over the past several years, the District's financial health is the envy of most other local jurisdictions: we have had a balanced budget for over 15 years, and our fiscal stability has gained and under my administration, I am proud to say, sustained and increased the well-earned confidence of the investment community. And yet our ongoing lack of budget autonomy -- our legal inability to spend a dime of even our locally generated tax dollars without an affirmative federal appropriation -- threatens to undermine this progress.

Budget autonomy is not only a fiscal policy issue. Fundamentally, it is a civil rights issue. The way the District is treated is shameful.

The District should not be required to submit its local funds for congressional review. Our government represents the over 600,000 residents of the nation's capital. Most Americans would be appalled if their decisions for their schools, libraries and parks required inspection and approval by Congress. The District should have the authority to decide how and when to spend the billions in annual locally generated tax dollars that our local government brings in -- similar to every other jurisdiction in this country. There is no good reason we should not be able as a

core principle of local governance to have the authority to decide how and when to spend the billions of dollars in annual tax dollars that we as local government generate.

I have spoken out time and time again on this issue at every chance. I feel so strongly about this that, for example, in April 2011 I joined DC Vote, a number of members of the Council, and dozens of fed up District residents in a protest in front of the United States Senate, and I was arrested and jailed along with my fellow protesters by the U.S. Capitol Police. Similarly, in 2011, on behalf of the District, as co-Chair of our delegation to the Democratic convention, I took the message of budget autonomy to the national convention of the Democratic Party in Charlotte, where it was the central theme of my remarks. We have succeeded in persuading President Obama to advocate for this view in Congress. As the President's FY 13 budget submission stated (at page 1317): "Consistent with the principle of home rule, it is the Administration's view that the District's local budget should be authorized to take effect without a separate annual Federal appropriations bill. The Administration will work with *Congress* and the Mayor to pass legislation to amend the D.C. Home Rule Act to provide the District with local budget autonomy." (Emphasis added). And, of course, my administration has worked closely with Congresswoman Eleanor Holmes Norton and the leaders of both houses of Congress to continue to move this issue forward so that we can attain a budget autonomy bill in Congress free from noxious social policy riders. That has been and continues to be one of our principal goals -- to secure a clean budget autonomy bill in Congress and, ultimately, to secure permanent, legally sound budget autonomy protections.

Legal Concerns About the Bill

But, and this is a significant "but": we have substantial concerns that by purporting to grant the District budget autonomy through local legislation with no affirmative vote by Congress, the bill, if enacted, may violate federal law. In particular, our lawyers have concerns that the bill may violate the Home Rule Act, Title 31 of the U.S. Code, or both. These concerns are summarized below.

Concerns that the Bill Would Violate the Home Rule Act

As you know, the HRA is a fundamental piece of legislation in which Congress in 1973 delegated many, though not all, of its governing responsibilities over the District of Columbia to the Mayor and the Council. It serves as our equivalent of a state constitution. The key concern is Section 303(d) of the HRA, which as enacted by Congress nearly forty years ago, provides that "The amending procedure provided in this section may not be used to enact any law or affect any law with respect to which the Council may not enact any act, resolution, or rule under the limitations specified in sections 601, 602, and 603." D.C. Code § 1-203.03 (emphasis added). This provision means that if the Council may not enact a law with respect to which the Council is barred from legislating under the "limitations specified" in sections 601-603 of the HRA, the referendum process of the HRA likewise may not lawfully be used to do so. The bill may violate this provision of the HRA in at least three different ways, any one of which would render it invalid if the bill were challenged in court.

i. HRA § 602(a)(3)

Section 602(a)(3) provides that the Council may not: "[e]nact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." D.C. Code § 1-206.02(a)(3). Section 602 of the Home Rule Act is expressly titled by Congress as a statement of "Limitations on the Council," so it is plain that it is a limitation. Thus, if the proposed bill would "concern[] the functions . . . of the United States" it is precluded by Section 303(d) from being legislated by the Charter amendment. By altering (albeit not eliminating) the role of Congress and the President in the review of the District's budget, the proposed initiative appears to concern the functions of the United States *and*, because it alters the role of Congress and the President, would not be limited in its application to the District. The bill is therefore problematic under this standard.

ii. HRA § 603(a)

If enacted, the bill may also violate HRA Section 603(a), which provides that "Nothing in this Act [the Home Rule Act] shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government."

Because Section 303(d) bars the use of referendum process to enact or amend any law under the limitations specified in Section 603, a key initial question is whether this provision in Section 603(a) is a limitation. The conclusion that Congress did not intend such a strict reading of the word "limitations" is supported by Congress's explicit reference in § 303(d) to "limitations" found in § 601, D.C. Code § 1-206.01, which contains in it no express limitation on the Council. Congress would not have done so if it meant in § 303(d) to refer only to provisions that are explicitly phrased as "limitations." Further, the HRA's legislative history shows that Congress intended to preserve the congressional appropriation process for the District's budget. Indeed, our lawyers have uncovered no indication in the HRA's legislative history that any member of Congress *ever* contemplated that the Charter-amending procedures could be used to affect Congress's appropriation of the total budget of the District Government. This matters because changing the approval route for over half of the District budget is something significant enough that Congress would likely have mentioned it if this was authority it intended to confer.

We are concerned that the bill's proposed change of the fiscal year would violate this limitation. Changing the timing of the fiscal year would appear to alter "existing law . . . relating to the respective roles of the Congress [and] the President . . . in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government," contrary to Section 603(a).

iii. HRA § 603(e)

Beyond Section 602(a)(3) and 603(a), we are further concerned that Section 603(e) would constitute a third, independent basis for invalidity of the proposed bill under the HRA. Section 603(e) provides that "Nothing in this Act shall be construed as affecting the applicability to the District Government of the provisions of section 3679 of the Revised Statutes of the United States, the so-called Anti-Deficiency Act," a long-standing law which requires that all expenditures of funds come from an appropriation so that federal agencies do not spend beyond their budgets.

Just as with Section 603(a), there is an initial question of whether 603(e) is a "limitation." For similar reasons as discussed above for Section 603(a), we think it is unlikely that Section 603(e) would be held by a court to be a mere canon of construction or suggestion by Congress. Further, the HRA legislative history makes clear that the language adopting the Anti-deficiency Act was intended to be substantively identical, *i.e.*, to keep the appropriations limits of the Anti-deficiency Act fully applicable to the District.

Because 603 is a "limitation[]" for purposes of the HRA's Section 303(d), the question is whether the bill if enacted would violate this limitation. I have substantial concerns that it would. My concern is that because under the proposed bill Congress will not have passed any appropriation for the District's local budget, those expending the District's local budget will be violating the federal Anti-deficiency Act, which carries with it criminal and civil penalties. I am very concerned about exposing our highly valued District employees to such professional and personal risks.

Concerns That the Proposed Bill Would Violate Title 31 of the U.S. Code

Even if the proposed bill did not exceed the limitations on the use of the Charter amending procedure specified in Section 303(d) the Home Rule Act, we are, separately, concerned that the bill would directly conflict with Title 31 of the United States Code, which deals with "Money and Finance." Under the Constitution, federal law would trump the Charter amendments if they became the law of the District and were in conflict with federal law.

Title 31 is an exercise of Congress's power under Article I of the Constitution, section 9, clause 7, which provides that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law . . . ." Title 31 was originally a codification of the Budget and Accounting Act of 1921, as amended. In 1982, Congress revised Title 31 and enacted it into law.

For reasons similar to those outlined above, it could conflict with the Anti-deficiency Act itself, the provisions of Title 31 requiring that expenditures of the District's budget not exceed the amounts available as appropriated by Congress. The limitations on the District's expenditures and obligations under 31 U.S.C. § 1341 are substantively the same as the provision in Section 446 of the Home Rule Act that "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been

approved by Act of Congress, and then only according to such Act." Expenditure or obligations of District funds pursuant to an act of the Council, but without congressional authorization, would not comply with Section 1341.

We are also concerned that if the proposed bill amended the Charter to provide a different fiscal year for the entire budget of the District Government, it would be in irreconcilable conflict with these provisions of federal law. No advocates for the bill have pointed us to any interpretations or guidance to the contrary from the federal agencies that administer these laws.

If the referendum were passed, executive branch officials who undertook to spend money as a result of the appropriations by the Council would be risking potential federal criminal charges for violations of the Anti-deficiency Act. This is not a dilemma that I would wish anyone working in my Administration or any future one in the District Government to have to face.

Practical Concerns

We must also evaluate additional practical risks associated with the bill.

First, I am not convinced that enough has been done to ensure that the bill will not undermine our crucial relationship with Congress before we take such a momentous step. For years, we have been working tirelessly on the difficult path through Congress that, while slow and arduous, like so many fights before that we have overcome, would after we achieved victory give us the clear, legally clean and necessary path to the desired result. It would be unfortunate and unwise to short-circuit efforts by Congresswoman Norton and those of the House and Senate leaders to continue pressing forward for this clean budget autonomy provision. If the District moves forward with Bill 19-993, I am concerned that the cause of getting Congress to approve D.C. budget autonomy may be set back many years if Members bristle at this attempt to circumvent their authority. Further, it would be even worse if such short-circuiting hurts our efforts on other significant fiscal and policy matters that the District has before Congress.

Second, we need to consider the risks, delays, and uncertainties that could be associated with future litigation over the validity of the District's local budget expenditures. As noted, budgets require predictability and stability, which could be threatened if the bill and referendum are passed.

Finally, I am concerned about going down the path proposed by the bill of a charter initiative to accompany the 2013 special election, as opposed to an election that will have a full slate of candidates for the Council and Mayor running as is scheduled in 2014. If, as some have said, the goal of the bill is to send a resounding message to Congress that District residents want budget autonomy, including the referendum during a special election may not be the best approach -- turnout for the April 2011 at-large special election was a little above 10%.

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For all these reasons, the bill's legal and practical risks should be more closely mitigated before we make a misstep that hurts the District and the stability of its budget process and exposes our highly valued District Government employees to civil or criminal liability risks. I respectfully urge caution and further consideration before leaping to the admittedly attractive prospect of attempting to secure budget autonomy for the District without any affirmative vote by Congress.

Sincerely,

Vincent C. Gray

Vincent C. Gray

cc: All Councilmembers
The Honorable Eleanor Holmes Norton

The Washington Post, October 26, 2012

An unlawful proposal for D.C. budget autonomy

By Wayne C. Witkowski and Leonard H. Becker, Published: October 26

The D.C. Council is moving forward with a proposal to use the referendum process to give the District autonomy over its local budget — that is, the approximately $6 billion a year that the District raises in local taxes — and thereby enable it to avoid the need to wait for congressional action as part of the often-delayed federal budget process. But this raises one big question: Can the referendum process lawfully be employed in this way to reduce the role of Congress under the Home Rule Act?

At the outset, let us state that we strongly believe that, after almost four decades of home rule, the District should be able to enact its budget for local revenue without having to get approval from Congress. Section 446 of the D.C. Charter (part of the Home Rule Act) is obsolete in this respect. Unfortunately, only an act of Congress can cure this defect.

Under the Constitution, Congress has the exclusive authority to legislate for the District. The Home Rule Act is the product of Congress's exercise of that authority, and what Congress has given, Congress can limit or even take away. To advance the discussion on this important issue, we want to state firmly the Home Rule Act does not permit a referendum on budget autonomy. The only way the charter can be amended as proposed is through an act of Congress.

To understand why, one has to look closely at the pertinent provisions of the Home Rule Act, so bear with us as we walk through the law. Section 303 of the act specifies that it may not be used "under the limitations of sections 601, 602, and 603." Those sections are titled "Reservation of Congressional Authority," and Section 603(a) states: "Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice" regarding "the preparation, review, submission, examination, authorization and appropriation of the total budget of the District of Columbia government." When the Home Rule Act was enacted, existing law, procedure and practice required the District's total budget to be approved by Congress, and the language of the act leaves little doubt that Congress intended to prevent the District from using Section 303 to eliminate this authority — including over the portion of the D.C. budget based on local revenue.

Essentially, the District is seeking to replace affirmative congressional review of its local budget (meaning that Congress must act to pass legislation approving the budget) with passive review (meaning the local budget becomes law unless Congress takes action to disapprove it). But Congress understood that overturning D.C. Council legislation under passive review — entailing diverting Congress from pressing national issues, expending scarce legislative time and resources to educate members about D.C. matters, winning majorities in both houses of Congress and

obtaining the president's sign-on — is a cumbersome process. Indeed, Congress has rarely overturned council legislation during the almost four decades of home rule. It is absurd to think that Congress gave the District the power to make its budget acts subject only to passive review, especially when such a change itself would be subject only to passive review.

Besides Section 603(a), Congress made its primary role in enacting the District's budget triply sure. Section 303 also adds the limitation in Section 603(e) declaring the continued applicability to the District of the federal Anti-Deficiency Act, which requires that expenditures of the federal and the D.C. governments not exceed the amounts as appropriated by Congress. Section 303 further adds the limitation in Section 602(a)(3), which prohibits the council from amending any act of Congress, such as the Anti-Deficiency Act, that concerns the functions of the United States. It's no wonder that for almost four decades, the District's elected leadership, officials and lawyers have not viewed Section 303 as a vehicle for changing the District's budget procedures.

Finally, among the legal risks of the current proposal is the prospect that the District will be sued and that the courts will rule this use of Section 303 to be unlawful. Unfortunately, if the District inflicts such an injury on itself, the cause of getting Congress to approve D.C. budget autonomy — the proper method to accomplish this — may be set back many years as members bristle at this attempt to circumvent their authority. Even if no suit is brought, D.C. government personnel who obligate and spend locally raised revenue will be in the untenable position of risking prosecution under the Anti-Deficiency Act — a strict liability statute that, under the Supremacy Clause of the U.S. Constitution, would preempt the proposed charter amendment.

It is simply unfair to place the District's employees in the position of choosing possible insubordination if they refuse to obligate or spend District funds, on the one hand, and prosecution under the Anti-Deficiency Act if they obligate or spend funds, on the other.

Wayne Witkowski is a former deputy attorney general for the Legal Counsel Division in the D.C. attorney general's office. Leonard Becker served as general counsel to Mayor Anthony A. Williams from 2003 through 2006.